UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

G4S REGULATED SECURITY
SOLUTIONS, A DIVISION OF
G4S SECURE SOLUTIONS (USA) INC.
f/k/a THE WACKENHUT CORPORATION

and

Cases 12-CA-26644 12-CA-26811

THOMAS FRAZIER, an Individual

and

CECIL MACK, an Individual

ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the undersigned Counsel for the Acting General Counsel files the following Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Supplemental Decision in the above cases.¹

¹ At footnote 1 on page 2 of its brief in support of exceptions, Respondent asserted a belated "exception" to the Board's Decision and Order Remanding reported at 358 NLRB No. 160. In the same footnote, Respondent stated that it "objects" to the Board's anticipated ruling on Respondent's instant exceptions. There is no mention of the quorum issue in Respondent's exceptions document. Even if Respondent is not deemed to have waived its right to raise the quorum issue, and the issue is considered, as the Board has consistently found, it is not appropriate for the Board to decide whether Presidential appointments are valid. Instead, the Board applies the well-settled "presumption of regularity support[ing] the official acts of public officers in the absence of clear evidence to the contrary." *Lutheran Home at Moorestown*, 334 NLRB 340, 341 (2001), citing *U.S. v. Chemical Foundation*, 272 U.S. 1, 14-15 (1926); *Center for Social Change*, 358 NLRB No. 24 (2012). Respondent has raised no argument that would warrant the Board reconsidering its position.

I. Statement of the Case

certain remedial issues.

The central issue before the Board pursuant to Respondent's exceptions is whether Respondent violated Section 8(a)(1) of the Act by discharging the Charging Parties, Thomas Frazier and Cecil Mack, from their jobs as lieutenants in the security force at Florida Power and Light's Turkey Point, Florida nuclear power plant, because of their protected concerted activities. The case was heard by Administrative Law Judge William N. Cates (ALJ) in April 2011. On June 27, 2011, the ALJ issued a Decision recommending the dismissal of the complaint based on his finding that Frazier and Mack were supervisors within the meaning of Section 2(11) of the Act. He did not address the merits of the Section 8(a)(1) allegations in the complaint.

On September 28, 2012, the Board issued a Decision and Order Remanding, reported at 358 NLRB No. 160, finding that Respondent failed to carry its burden to prove that Frazier and Mack were supervisors within the meaning of Section 2(11) of the Act. The Board reversed the ALJ's dismissal of the complaint and remanded the case for appropriate credibility resolutions, findings of fact, and conclusions of law on the merits of the complaint allegations that the Respondent violated Section 8(a)(1) by discharging Frazier and Mack because they engaged in protected, concerted activities.²

On November 16, 2012, the ALJ issued his Supplemental Decision in the abovecaptioned proceedings wherein he determined that Respondent violated Section 8(a)(1)

² Although the Board did not specifically include the alleged unlawful suspension of Frazier and Mack in its Order Remanding, the Acting General Counsel has filed exceptions to the ALJ's failure to find and conclude that Respondent "indefinitely suspended and discharged" Frazier and Mack for engaging in protected concerted activities. See Acting General Counsel's exceptions 17 and 18, filed with the Board on August 24, 2011. Counsel for the Acting General Counsel believes that the Board's failure to order the ALJ to consider the suspensions on remand was unintentional, and is separately filing cross-exceptions and a supporting brief regarding the ALJ's failure to find the suspensions to be unlawful and regarding

of the Act by discharging the Charging Parties, Thomas Frazier and Cecil Mack, in retaliation for their protected concerted activities. On December 21, 2012, Respondent filed exceptions with the Board. Certain exceptions refer to specific findings and conclusions reached by the ALJ in his Supplemental Decision while others challenge the authority of the Board to make rulings upon which the ALJ relied.

II. The ALJ Considered all Relevant Evidence and Properly Concluded that Respondent Unlawfully Discharged Thomas Frazier and Cecil Mack because they Engaged in Protected Concerted Activity. (Respondent Exception 2)

Contrary to Respondent's claim in its exception 2, the ALJ's findings that Respondent discharged Thomas Frazier and Cecil Mack because they engaged in protected concerted activities is supported by substantial and properly credited record evidence, and is consistent with Board law. The ALJ found that Frazier and Mack raised issues concerning inadequate shelter and bathroom facilities, uncomfortable chairs, insufficient water at the work site, and a requirement relating to lanyards on security officers' weapons, and that security officers wear heavy vests.³ These concerns were brought to the attention of management by Frazier and Mack on behalf of security officers, a fact which Respondent does not dispute. (ALJSD 2:40-3:2, 6:19-37, 7:4 to 8:17; Tr. 164-168, 170-171,173:15-23, 177:15-23, 179-181, 252:18, 253:15, 254:3-4, 255:1-7, 275- 276; GCX 27; 28).⁴ As noted above, the ALJ's conclusions are predicated on the Board's determination that Respondent's lieutenants, including

³ The vest requirement was imposed by Respondent's client, Florida Power and Light, but was not required by the Nuclear Regulatory Commission.

⁴ As used herein, "ALJSD" refers to the the ALJ's Supplemental Decision, "Tr" refers to the transcript, "GCX" refers to the Acting General Counsel's exhibits, and "RX" refers to Respondent's exhibits. The numbers following ALJSD and Tr refer to the page and/or line numbers of those documents. For example Tr. 1:1-2 refers to page 1, lines 1 and 2 of the transcript.

Frazier and Mack, are not supervisors. *G4S Regulated Security Solutions*, 358 NLRB No. 160 (2012).

The ALJ found that Respondent discharged Frazier on February 15, 2010, following its suspension of Frazier on February 12, 2010, based on an unsatisfactory evaluation, and discharged Mack on February 22, 2010, following its suspension of Mack on February 2, 2010, based on an unsatisfactory evaluation and on the pretext that Mack made an inappropriate comment, which Mack credibly denied. (ALJSD 2:22-23, 5:35 to 7:17).

As the ALJ found, the following statements in Respondent's evaluation of Frazier, which directly led to his suspension and discharge, establish that Respondent discharged Frazier because he engaged in protected concerted activities: "[Frazier] doesn't see himself a part of management and therefore is not leading us into the future" and, at team briefing, "[O]penly criticizes management decisions." The ALJ properly relied on Respondent's evaluation comment "[Frazier] fails to balance the need of the organization with his sensitivity to individuals," and his "sensitivity to individuals is an overused strength with negative impact." (ALJSD 3:14-18; GCX 7). The ALJ also properly relied on Project Manager Mareth's testimony that Frazier did "not effectively support management" and "would not effect change going forward." (ALJSD 3:9-10, 20-22, 7:24-26, 8:9-13).

The ALJ properly relied on similar evidence in Mack's evaluation to support his conclusion that Respondent discharged Mack for engaging in protected concerted activities: "He doesn't see himself a part of management and as viewed by one direct report [i.e. a security officer], 'Is on the security officer's side." As the ALJ found,

Respondent also wrote in the evaluation that Mack had an "over alignment with security officer concerns," and he is "more of 'a team member' than a team leader." The ALJ further found that Mack was criticized for failing to "seek different opinions from all levels of management to gain a balanced approach to team performance." (ALJSD 3:27-34; GCX 12, 2nd page regarding the direct report's comment that Mack is on the security officers' side; GCX 13, page 1).

Respondent asserted that Mack made an inappropriate comment that led to his suspension and that was a basis to discharge Mack in addition to the aforementioned evaluation of Mack. The ALJ properly found and concluded that this purported comment did not occur and that Respondent's assertion that Mack made the comment was a pretext and was not the real reason Respondent fired Mack. (ALJSD 3:36 to 5:24, 7:26 to 8:7; Tr. 277-287; GCX 22). The ALJ credited the testimony of Mack over Mareth. (ALJSD 7:40 to 8:4) The ALJ was unimpressed with Mareth's claim that he had a good-faith honest belief that Mack made a comment relating to a "cluster fuck" in a voice "loud enough for everyone to hear." The ALJ also discredited Mareth, in part, because Florida Power and Light Security Analyst Ostensen did not claim that Mack made the purported comment, and Respondent failed to call Florida Power and Light managers Rittmer and Sengenberger, who were presumably present when the alleged comment was made, as witnesses. In addition, the ALJ properly found that Rittmer's failure to take any immediate action against Mack demonstrated that Mack did not make the alleged comment. (ALJSD 5:1-14, 8:3-7). Additionally, the ALJ relied on investigatory statements supplied by three security officers which do not mention Mack saying "cluster fuck." (ALJSD 5:6-8). Based on the record evidence, the ALJ properly

concluded that Mack did not make any comment relating to a "cluster fuck" which Respondent asserts to have been a basis for his discharge. (ALJSD 5:10-16, 7:34-35, 8:4). The ALJ also properly concluded that even if there was an additional basis to discharge Mack based on the alleged comment, Respondent failed to establish that the same action would have been taken under the circumstances and "discipline for the alleged offense would, at worst, have been a documented oral counseling." (ALJSD 7:28-29; GCX 17 at pages 3 and 9; Tr. 288:22-25).

In summary, there is strong evidence supporting the ALJ's conclusions that employees Frazier and Mack engaged in protected concerted activities by bringing complaints to management on behalf of security officers which constituted protected concerted activity, and that Respondent discharged Frazier and Mack because they engaged in protected concerted activities.⁵ (ALJSD 7:1-32).

III. The ALJ Applied Controlling Authority in Concluding that Respondent Discharged Frazier and Mack Because they Engaged in Protected Concerted Activities. (Respondent Exception 1)

Respondent's claim that the ALJ failed to analyze the facts and apply relevant Board law is without merit. Individual employees who bring group complaints about workplace issues to the attention of management are engaged in concerted activities that are protected by Section 7 of the Act. *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986).

Respondent does not dispute that Frazier, who worked for Respondent for 21 years, complained about working conditions and spoke up for others. Frazier's complaints to management about working conditions were the outgrowth of his earlier

⁵ See also the Acting General Counsel's brief in support of exceptions submitted to the Board on August 24, 2012, at pages 27 to 38.

discussions with Union President Lambert and other employees about working conditions, and therefore constituted concerted and protected activity. *Phillips Petroleum Company*, 338 NLRB 916 (2003); *Every Woman's Place*, 282 NLRB 413 (1986), and cases cited therein; see also *Midland Hilton & Towers*, 324 NLRB 1141 (1997); *Mike Yurosek & Son, Inc.*, 306 NLRB 1037, 1038 (1992), after remand 310 NLRB 831 (1993), enfd. 53 F.32d 261 (9th Cir. 1995). Moreover, as Respondent acknowledged in the Leadership Effectiveness Review, Frazier's complaints to management were frequently made at the shift briefings in the presence of other employees. In this regard, Respondent admits that the Safety Conscious Work Environment and Employee Satisfaction Process may entail circumstances where employees who bring issues forward are engaged in "Protected Activity." (RX 19 at page 2).

As with Frazier, Respondent does not dispute the evidence that Mack, a nine year employee, spoke up for other employees concerning their working conditions. Like Frazier, Mack relayed concerns about working conditions that security officers had discussed with him to management, and did so at meetings conducted by management and in the presence of other employees. Such complaints are both protected and concerted. *Phillips Petroleum Company*, 338 NLRB 916 (2003). Mack's Leadership Effectiveness Review, dated February 9, 2010, parrots the Leadership Effectiveness Review of Frazier and references Mack's protected concerted activities by criticizing him for siding with the security officers at meetings. Respondent concedes that Mack was discharged as a result of Respondent's review of his personnel file which included the Leadership Effectiveness Review. (Tr. 102:7-10 MacDonald).

The ALJ properly concluded that since Frazier and Mack are not supervisors. "their bringing complaints to management on behalf of the security officers and being on the side of the security officers constituted protected concerted activity." (ALJSD 7:7-9). This conclusion was based on the Board's finding that lieutenants were not supervisors. G4S Regulated Security Solutions, 358 NLRB No. 160 (2012). The ALJ also made the following correct determination with regard to the protected concerted activity and the discharges: "The evaluations reflect that the performance of Frazier and Mack was found to be unsatisfactory because, rather than giving full allegiance to management. they did not see themselves as 'a part of management' but instead were 'on the security officer's side." (ALJSD 7:4-6) Respondent's claim that this statement does not establish that participation in protected concerted activity was a substantial or motivating factor in the decision to discharge Frazier and Mack is without merit. This argument ignores the record evidence described above which establishes that Respondent fired employees Frazier and Mack because, by siding with security officers, they engaged in protected concerted activities.

The ALJ properly found and concluded that there is no real dispute as to the fact that Respondent discharged Frazier and Mack because the very conduct in which they engaged constituted protected concerted activities, as demonstrated by multiple comments in the evaluations upon which Respondent relied to discharge them. (ALJSD 7:4-12). In these, circumstances, an analysis pursuant to *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1981), is not required. Moreover, the ALJ properly concluded that Respondent's asserted, but

 $^{^{6}}$ Burnup & Sims, Inc., 256 NLRB 965, 976 (1981); CGLM, Inc., 350 NLRB 974, 974, fn.2 (2007), enfd. 280 Fed. Appx. 366 (5th Cir. 2008), cited by the ALJ.

incorrect, belief that it was privileged to fire Frazier and Mack because its lieutenants were statutory supervisors, is unfounded.⁷ See *Entergy Mississippi, Inc.*, 358 NLRB No. 99 (2012); *Pilot Freight Carriers, Inc.*, 221 NLRB 1026, 1028-1029 (1975), revd. on other grounds, 558 F.2d 205 (4th Cir. 1977), cert. denied 434 U.S. 1011 (1978); see also *Shelby Memorial Home*, 305 NLRB 910, 910, fn.2, enfd. 1 F.3d 550 (7th Cir. 1993).

IV. The ALJ Considered all Relevant Evidence and Properly Concluded that Respondent would Not have Discharged Thomas Frazier and Cecil Mack in the Absence of Protected Concerted Activity (Respondent Exceptions 3 and 4).

Respondent asserts that it would have discharged Frazier and Mack even if they had not engaged in protected concerted activities. However, even if this is considered as a dual motive case, the evidence supports the ALJ's reasoned conclusion that the Acting General Counsel established a prima facie case that Frazier and Mack were engaged in protected concerted activities, Respondent knew about those activities, and Respondent expressed animus against Frazier and Mack because they engaged in those activities in the evaluations upon which Respondent relied to discharge them.

(ALJSD 7:14-32). Frazier and Mack persistently pursued employee complaints about working conditions with management, and Respondent discharged them because they allied themselves with their coworkers with respect to working conditions, rather than with management, as stated in their evaluations.

The documentary evidence establishes that Respondent was upset with Frazier because he complained about working conditions in the presence of co-workers on his

⁷ It is noted that Respondent created the lieutenant classification and "promoted" its sergeants, including Frazier and Mack, to the lieutenant position without changing their duties so as to make them statutory supervisors, following the Board's 2005 ruling that the sergeants were not statutory supervisors. *Wackenhut Corp.*, 345 NLRB 850 (2005), cited by the Board in its Decision and Order Remanding in the instant case. 358 NLRB No. 160, slip op. at p.1, fn.1. In view of the prior case, Respondent cannot claim it was unaware that it acted at its peril by treating the lieutenants as supervisors.

team and because he attempted to influence co-workers by stating his opinions about working conditions in group meetings. Based upon the comments in Frazier's Leadership Effectiveness Review, it is evident that Frazier's protected concerted activity was the main factor contributing to the low score of his unsatisfactory evaluation, and which motivated the Respondent to suspend and discharge him.

The record evidence shows, and the ALJ correctly concluded, that the real reason Respondent discharged Mack is the same reason it suspended and discharged Frazier, because he engaged in protected concerted activities on behalf of the security officers. Respondent admits that it conducted a review of Mack's entire personnel file and the decision to discharge him was based on that review, which included Mack's Leadership Effectiveness Review dated February 9, 2010. The timing of the Leadership Effectiveness Review, and Respondent's criticism of Mack therein for speaking at meetings on behalf of security officers, establishes a strong prima facie case that Mack's protected concerted activities motivated Respondent's decision to discharge him.

The ALJ properly found that Respondent failed to establish that it would have suspended and discharged Frazier or Mack even if they had not engaged in protected concerted activities. Respondent's contention to the contrary is not supported by the evaluations themselves or by any other evidence.

With respect to Mack, the ALJ concluded that the alleged misconduct on January 25, 2010 (the purported "cluster fuck" comment), did not occur, and even if it did, it constitutes a Level III discipline under the Progressive Discipline Policy and at worst, it warranted a documented oral counseling. (ALJSD 7:26-29; GCX 17 at page 3). The

ALJ further properly found, based on the uncontradicted testimony of Union President Timothy Lambert:

...that it is "fairly prevalent to hear profanity throughout your working day." He acknowledged that abusive or offensive language towards another person would not be tolerated, but when directed to a situation "there's not much response to it," that "occasionally someone [who is offended] will say something." (ALJSD 5:27-32).

The ALJ also credited Mack and found that he had never been disciplined for use of abusive or offensive language in the presence of fellow officers or others in the past. (ALJSD 5:16; Tr. 288:22, 23-25). In addition, the record evidence shows that Mack exceeded expectations and achieved a rating of "3" with respect to focusing on the customer, a trait which is contrary to the alleged misconduct. In his evaluation of Mack for the period from January 1, 2009 to December 31, 2009, Captain Ferrer noted that Mack "Projects positive a 'can do' image" and "Communicates well, with courtesy and effectiveness." (GCX 14 at page 1).

Respondent argues that the ALJ failed to consider that other employees have been raising issues for years without repercussion. However, the ALJ correctly found that other employees to whom Respondent refers were not considered to be supervisors and were not subject to the leadership effectiveness review process.

(ALJSD 6:39-40). The ALJ further correctly determined that Respondent bore animus towards individuals whom it deemed to be supervisors engaging in the protected concerted activity of raising complaints on behalf of security officers and thereafter being on the security officers' side. (ALJSD 7:22-24).

Respondent also argues that the ALJ failed to consider that other lieutenants who were not engaged in protected activity were terminated for receiving unsatisfactory evaluations. In this regard, the ALJ properly found that since no unfair labor practice charge was filed with respect to other lieutenants who were discharged, there was no investigation or determination concerning a violation of the Act with regard to their discharges. (ALJSD 6:39-43).

In summary, even if a *Wright Line* analysis is appropriate in this case, the Acting General Counsel has established a prima facie case that Respondent discharged Frazier and Mack because they engaged in protected concerted activities, and Respondent had failed to establish that it would have taken the same actions in the absence of their protected concerted activities.

V. The ALJ Properly Found and Concluded that Thomas Frazier and Cecil Mack were not Supervisors as Defined in Section 2(11) of the Act. (Respondent Exception 5)

In *G4S Regulated Security Solutions*, 358 NLRB No. 160 (2012), the Board ruled that Frazier and Mack were employees entitled to protection under the Act. The ALJ's findings and conclusions are consistent with the Board's ruling.

VI. Conclusion

In view of all of the above, it is proper to uphold the ALJ's conclusion that Respondent violated Section 8(a)(1) of the Act by discharging Frazier and Mack because of their protected concerted activities. Accordingly, Counsel for the Acting General Counsel respectfully submits that the Board should deny Respondent's exceptions in their entirety.

DATED at Miami, Florida this 11th day of January, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of Acting General Counsel's Answering Brief to Respondent's Exceptions in the matter of G4S Regulated Security Solutions, A Division of G4S Secure Solutions (USA), Inc., f/k/a The Wackenhut Corporation, Cases 12-CA-26644 and 12-CA-26811 were served electronically upon the following individuals on this 11th day of January, 2013.

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